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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-475

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, et al.,

Petitioners

v.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

GEORGE B. PLETSCH,
7200 Sears Tower
Chicago, Illinois 60606
Attorney of Record for The Sac and Fox Tribe of Indians of Oklahoma, et al.

AARON J. KRAMER,
SCHIFF HARDIN & WAITE
Of Counsel

LAWRENCE C. MILLS,
29 South LaSalle Street
Chicago, Illinois 60603
Attorney of Record for The Sac and Fox Tribe of the Mississippi in Iowa, et al.

MILLS AND GARRETT,
Of Counsel

STANFORD CLINTON,
6000 North Bay Road
Miami Beach, Florida 33140
Attorney of Record for The Sac and Fox Tribe of Missouri, et al.

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL, TREATY AND STATUTORY PROVISIONS INVOLVED	5
STATEMENT OF CASE	6
The Historical Events	6
Indian Claims Commission Act	8
Trial of Sac and Fox Claims	9
First Appeal to Court of Claims	13
Proceedings on Remand to Commission	13
Second Appeal to Court of Claims	14
REASONS FOR GRANTING THE WRIT	15
I. The Decisions Below Violate Due Process, The Intent Of The Remedial Indian Claims Commission Act, And The Rule In *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U.S. 689 (1933) By Depriving Petitioners Of The Right To Fair Market Value For Their Eastern Iowa Lands By Adoption Of An Erroneous Hypothetical Valuation Standard Rather Than The Best Evidence Of The Real Value of Petitioners' Lands	15
The Intent of Congress	15
The General Legal Precedents	17
Precedents in Indian Cases	21
II. Petitioners Have Been Deprived Of A Hearing On The Fair Market Value For Their Eastern Iowa Lands By Being Denied The Right To Submit Additional Evidence Of Value In Conformity With A New Rule Of Law Which Was Retroactively Applied To Petitioners' Case After Trial In Violation Of The Rule In *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971)	23
CONCLUSION	26

TABLE OF AUTHORITIES

PAGE

Cases:

Alcea Band of Tillamooks, et al. v. *United States,* 115 Ct. Cl. 463, 87 F.Supp. 938 (1950), reversed as to interest, 341 U.S. 48 (1951) 9, 21

Arkansas Louisiana Gas Co. v. *McGaughey Bros., Inc.,* 468 S.W.2d 754 (Ark. 1971) 21

Carter Products, Inc. v. *Colgate-Palmolive Company,* 214 F.Supp. 383 (D.Md. 1963) 20

Chevron Oil Co. v. *Huson,* 404 U.S. 97 (1971) 4, 25

The Iowa Tribe of the Iowa Reservation in Kansas and Nebraska, et al. v. *The United States,* 22 Ind. Cl. Comm. 385 (1970) 2, 11, 12

Miami Tribe of Oklahoma, et al. v. *United States,* 146 Ct. Cl. 421, 175 F.Supp. 926 (1959) 9

Osage Nation of Indians v. *United States,* 119 Ct. Cl. 592, 97 F.Supp. 381 (1951), cert. denied, 342 U.S. 896 (1951) 9, 22

Rogue River Tribe of Indians, et al. v. *United States,* 116 Ct. Cl. 454, 89 F.Supp. 798 (1950), cert. denied, 341 U.S. 902 (1951) 9, 22

The Sac and Fox Tribe of Indians of Oklahoma, et al. v. *The United States,* 5 Ind. Cl. Comm. 367 (1957) .. 7

The Sac and Fox Tribe of Indians of Oklahoma, et al. v. *The United States,* 32 Ind. Cl. Comm. 256 (1973) 2, 12, 14, 18, 32, 33

Sac and Fox Tribe of Indians of Oklahoma, et al. v. *United States,* 167 Ct. Cl. 710, 340 F.2d 368 (1964) ..9, 22

The Sac and Fox Tribe of Indians of Oklahoma, et al. v. *The United States,* 196 Ct. Cl. 548 (1971) 2, 13

The Sac and Fox Tribe of Indians of Oklahoma, et al. v. *The United States,* 20 Ind. Cl. Comm. 439 (1969) .2, 18

Sinclair Refining Co. v. *Jenkins Petroleum Process Co.,* 289 U.S. 689 (1933) 4, 19

PAGE

Snoqualmie Tribe of Indians ex rel. Skykomish Tribe of Indians v. *United States*, 178 Ct. Cl. 570, 372 F.2d 951 (1967) 8

United States v. *Brooklyn Union Gas Co.*, 168 F.2d 391 (2d Cir. 1948) 20

United States v. *237,500 Acres of Land, etc.*, 236 F.Supp. 44 (S.D. Cal. 1964), aff'd sub nom. 404 F.2d 336 (9th Cir. 1968) 20

Statutes:

25 U.S.C. § 70s 2, 5

25 U.S.C. § 70a 5, 8, 9

28 U.S.C. § 1255 2

Miscellaneous:

Letter of August 1, 1946 from Hon. J. A. Krug, Secretary of Interior to President Harry S. Truman 16

House Report No. 1466, 79th Cong., 1st Sess. 16

The Iowa Treaty of October 19, 1838 (7 Stat. 563) ... 12

The Sac and Fox Treaty of September 21, 1932 (7 Stat. 374) 5, 7

The Sac and Fox Treaty of September 28, 1836 (7 Stat. 520) 5, 7

The Sac and Fox Treaty of October 21, 1837 (7 Stat. 540) 5, 7

Statement enclosed with letter of Hon. Tom C. Clark, Attorney General (Hearings before Senate Committee on Indian Affairs on H.R. 4497, 79th Cong., 2nd sess., p. 25) 16

Statement by President Harry S. Truman, released August 13, 1946 17

United States Constitution, Amendment V 5, 15

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No. 75-

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, et al.,

Petitioners

v.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners, the Sac and Fox Tribe of Indians of Oklahoma, the Sac and Fox Tribe of the Mississippi in Iowa, the Sac and Fox Tribe of Missouri, and individual members of the tribes as representatives of all members (hereinafter "petitioners"), respectfully pray that a writ of certiorari issue to review the decisions of the United States Court of Claims entered in this cause on April 25, 1975 and June 27, 1975.

OPINIONS BELOW

The two decisions of the Court of Claims as to which petitioners seek a writ of certiorari appear at pages 1 and 2 of the separate printed appendix ("App.") filed with this

petition. Three earlier opinions in this cause by the Court of Claims and the Indian Claims Commission are also included in the Appendix as follows: (a) *The Sac and Fox Tribe of Indians of Oklahoma, et al.* v. *The United States,* 32 Ind. Cl. Comm. 256 (1973) (App. 3-18); (b) *The Sac and Fox Tribe of Indians of Oklahoma, et al.* v. *The United States,* 196 Ct. Cl. 548 (1971) (App. 19-27); and (c) *The Sac and Fox Tribe of Indians, et al.* v. *The United States,* 20 Ind. Cl. Comm. 439 (1969) (App. 28-88). The directly related case of *The Iowa Tribe of the Iowa Reservation in Kansas and Nebraska, et al.* v. *The United States,* 22 Ind. Cl. Comm. 385 (1970) also is included in the Appendix (App. 91-120).

JURISDICTION

Petitioners seek review of the Court of Claims' decisions entered on April 25, 1975 and on June 27, 1975, when petitioners' motion for rehearing *en banc* was denied. This petition was filed within 90 days of such denial. The Court's jurisdiction to grant a writ of certiorari in this cause is based upon 25 U.S.C. § 70s (App. 138-139) and 28 U.S.C. § 1255.

QUESTIONS PRESENTED

Partly as indemnity for a war for which it was not responsible and because of other events beyond its control, the Sac and Fox Nation was compelled in the 1830's to cede to the United States some of the most valuable agricultural lands and lead resources in the world for only a fraction of what the lands were then worth. Petitioners are the successors to the Sac and Fox Nation. They seek in this action under the remedial Indian Claims Commission Act to recover, as damages from the United States, the difference between the fair value of the lands at the valuation

dates, 1833, 1837, and 1838, and the substantially lower amounts that the United States paid for them under coercive treaties.

At the time of the 1962 trial of the value of the eastern Iowa lands, an unbroken line of precedents of the Court of Claims held that private sales of unimproved lands occurring after the valuation dates constituted evidence of the fair value of those lands at the taking dates. In reliance on these precedents, petitioners offered, as the best evidence of the fair value of the cession lands, evidence of a multitude of private sales of the eastern Iowa lands which took place between late 1838 and 1849 and which established unimproved land values averaging between $2.50 and $3.00 per acre.

In its opinion rendered in 1969 the Commission rejected this evidence on the theory that at the valuation dates a hypothetical purchaser (the Commission's approach to the valuation of the lands) would not have known the prices that the lands soon brought in the private market.

On a later remand from the Court of Claims, the Commission again refused to consider the post-cession private sale transactions as proof of value. The Commission twice denied petitioners' motions on remand to offer evidence of private sale transactions in comparable lands occurring at or prior to the cession dates, notwithstanding its holding that such proof was lacking from the record and that it considered such proof as the best evidence of value.

The Sac and Fox petitioners have therefore never had a hearing on the best evidence of the value of their lands, whether that best evidence be the post-cession private sale transactions in those lands or private sale transactions in comparable lands at or prior to the cession dates. The four decisions below of the Court of Claims and the Commission do not contain any reference to the previous uniform precedents of the Court of Claims as to the probative

weight of post-cession private land sales on which petitioners relied in structuring the theory of their case at trial. Nor do the four opinions cite or consider the holdings in *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U.S. 689 (1933) and *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971) which squarely establish petitioners' comprehensive post-cession sales evidence as the best evidence of value, or alternatively, petitioners' undeniable right to submit additional evidence of value to comply with the change in the law created by the Commission's rejection of the governing Court of Claims' precedents.

In summary form, the two questions presented by this petition are as follows:

I.

Whether, in violation of the remedial intent of the Indian Claims Commission Act (the "Act") to resolve ancient Indian claims, and in violation of the rule in *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U.S. 689 (1933), petitioners have been deprived of the right to fair market value for their eastern Iowa lands by the adoption of an erroneous valuation standard which relies upon purely hypothetical criteria rather than the best historical evidence of the real value of petitioners' lands?

II.

Whether, in violation of the rule of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), petitioners have been deprived of a hearing on the fair market value for their eastern Iowa lands by being denied the right to submit additional evidence of value in conformity with a new rule of law that was retroactively applied to petitioners' case after trial?

CONSTITUTIONAL, TREATY AND STATUTORY PROVISIONS INVOLVED

The treaties and statutes involved in this cause are printed in the Appendix to this petition as follows: (a) the Sac and Fox Treaty of September 21, 1832 (7 Stat. 374) (App. 121-126); (b) the Sac and Fox Treaty of September 28, 1836 (7 Stat. 520) (App. 127-131); (c) the Sac and Fox Treaty of October 21, 1837 (7 Stat. 540) (App. 132-135); (d) Section 70a of the Indian Claims Commission Act (25 U.S.C. § 70a) (App. 136-137); and (e) Section 70s of the Indian Claims Commission Act (25 U.S.C. § 70s) (App. 138-139). The constitutional provision involved in this matter is the Fifth Amendment to the United States Constitution in pertinent part as follows:

United States Constitution, Amendment V

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF CASE

The Historical Events

Petitioners are the successors to the once formidable and respected Sac and Fox Nation. At its zenith, the Nation was the dominant Indian tribe in the Mississippi Valley between roughly St. Louis on the south and the Wisconsin River on the north. During the Revolutionary War, the Sac and Fox was the only significant western Indian tribe friendly to the United States. At that time, and for a number of years thereafter, the Nation's capital, known as Saukenuk, was located near present Rock Island, Illinois. When the Revolutionary War ended, the Sac and Fox Nation was politically well-organized, prosperous and healthy for an Indian tribe. Commencing with the turn of the century, however, the Sac and Fox began to fare rather badly and unluckily in their dealings with the United States.

In November, 1804, five Sac and Fox Indians were induced to sign a treaty with the United States ceding all of the Sac and Fox lands east of the Mississippi River, including the capital city of Saukenuk, and some lands in Missouri in the vicinity of St. Louis, for the token sum of $1,000 per year. The Sac and Fox leadership immediately and continuously protested to the United States that the five Indians had no authority to make the treaty, but to no purpose. The United States insisted, although not without the misgivings and doubts expressed by some of its representatives, that the treaty was the binding obligation of the Sac and Fox Nation.

By diplomacy and strategy and some plain stubbornness, the Sac and Fox were able to occupy the ceded lands for another twenty-four years. In 1828, Illinois insisted that they must go and the Nation's capital was moved west of the Mississippi River to a location on the Iowa River. One group, Black Hawk's band, comprising about one-sixth of the Nation's population, mutinied and refused to leave Illi-

nois. A series of confrontations between the band and representatives of the United States and the State of Illinois led finally in 1832 to the inglorious episode known as the Black Hawk War and the defeat and destruction of the band.

The lands owned by the Sac and Fox Nation in Iowa bordering on the Mississippi River were some of the most valuable in the United States; they possessed in abundance all of the qualities sought by settlers and they contained lead ores mined by the Sac and Fox that were thought to be some of the most valuable in the world. Prior to 1832, the Sac and Fox rejected frequent overtures of the United States for the sale of these lands.

The Sac and Fox Nation had no responsibility for the Black Hawk War and the Commission has twice so found. See, e.g., *The Sac and Fox Tribe of Indians of Oklahoma, et al.* v. *The United States,* 5 Ind. Cl. Comm. 367, 435 (1957). But this was not the official viewpoint in 1832. The United States insisted that the Sac and Fox cede the rich eastern Iowa lands and the lead resources partly as indemnity for the Black Hawk War, and a treaty (7 Stat. 374) so providing was signed on September 21, 1832. (App. 121-126) By a treaty (7 Stat. 520) concluded on September 28, 1836, the Nation ceded its interest in a small area along the Iowa River where the Nation's capital had relocated eight years earlier. (App. 127-131) A third cession was made the following year by a treaty dated October 21, 1837 (7 Stat. 540). (App. 132-135) These three treaties effectively ceded all of the Nation's interest in approximately 5.6 million acres of eastern Iowa.[1]

The three purchases were looked upon by contemporary officials as splendid bargains. In transmitting the executed Treaty of September 28, 1836, to the Commissioner of Indian Affairs, United States Commissioner H. B. Dodge,

[1] The ceded areas will sometimes be referred to as the "eastern Iowa lands."

who negotiated the purchase of the Sac and Fox lands along the Iowa River for 75¢ per acre, wrote that the lands had a value of at least $3.00 per acre. (Petitioners' trial exhibit A-7)

After 1832, it was all decline for the Sac and Fox Nation. The last of the national territory in central Iowa was ceded in 1842. Kansas territory was the next stop and that small reservation was ceded in 1859 and 1867. The sale of the last reservation area in Oklahoma was completed in 1891.

And there matters stood for the Sac and Fox Nation until the Congress in 1946 enacted the Indian Claims Commission Act. (25 U.S.C. § 70a, et seq.)

Indian Claims Commission Act

Prior to 1946, the Congress had on occasion passed special legislation permitting a particular tribe to seek redress for wrongs allegedly committed by the United States. The experience with this special legislation was generally unsatisfactory. An obvious deficiency was that only a small number of Indian tribes were afforded the opportunity to have their claims of wrongdoing against the United States heard.

Commencing about 1930, numerous proposals were put before Congress for the enactment of general legislation. By adoption of the Act in 1946, Congress intended to provide a forum in which all claims and demands of Indian tribes against the United States could be heard and determined and put to rest for all time. Congress and the Court of Claims have recognized that "the Act creating the Indian Claims Commission was 'primarily designed to right a continuing wrong to our Indian citizens . . .' [citing H. Rep. No. 1466, 79th Cong., 2d Sess., U.S. Code Cong. Serv. p. 1347 (1946)]" *Snoqualmie Tribe of Indians ex rel. Skykomish Tribe of Indians* v. *United States,* 178 Ct. Cl. 570, 582, 372 F.2d 951, 957 (1967). To that end, the Act authorizes suit against the United States for every

conceivable legal and equitable claim and in addition provides that the Commission may hear and determine claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. (25 U.S.C. § 70a (5); App. 136) The Commission's jurisdiction specifically extends to "claims which would result if the treaties • • • between the claimant and the United States were revised on the ground of • • • unconscionable consideration • • •." (25 U.S.C. § 70a (3); App. 136)

Trial of Sac and Fox Claims

In 1951, timely petitions were filed by the Sac and Fox Nation asserting claims and seeking the recovery of damages under the Act with respect to the eastern Iowa lands. The Commission determined that the petitioners had formerly owned 5,584,433.5 acres of the three tracts, and that certain offsets would be allowed the United States out of any awards allowed petitioners. These determinations are final. By mid-1962 the remaining principal issue was whether petitioners had sustained damages by the failure of the United States to pay fair value for the eastern Iowa lands.

At the 1962 trial of this issue before the Commission, petitioners, in reliance upon an unbroken line of decisions of the Court of Claims,[1] presented evidence of private sale transactions in the eastern Iowa lands occurring shortly

[1] *Alcea Band of Tillamooks, et al.* v. *United States,* 115 Ct Cl. 463, 87 F.Supp. 938 (1950), reversed as to interest, 341 U.S. 48 (1951); *Rogue River Tribe of Indians, et al.* v. *United States,* 116 Ct. Cl. 454, 89 F.Supp. 798 (1950), cert. denied, 341 U.S. 902 (1951); *Osage Nation of Indians* v. *United States,* 119 Ct. Cl. 592, 97 F.Supp. 381 (1951), cert. denied, 342 U.S. 896 (1951); *Miami Tribe of Oklahoma, et al.* v. *United States,* 146 Ct. Cl. 421, 175 F.Supp. 926 (1959). This line of cases was strongly reaffirmed in *Sac and Fox Tribe of Indians of Oklahoma, et al.* v. *United States,* 167 Ct. Cl. 710, 340 F.2d 368 (1964). Further discussion of these governing precedents, which have never been disapproved by the Court of Claims, appears at pp. 21-23, *infra.*

after the cession dates as primary proof of the value of these lands at the valuation dates, 1833, 1837, and 1838. The depth and breadth of this private sale evidence was unprecedented in the annals of cases previously presented to the Commission. Modern data processing techniques were applied to raw data consisting of 176 deed books and original entry records in nineteen eastern Iowa counties involving 70,000 pages and 19,000 deeds, and covering *all* public and private land sales between 1838 (the date of first public land sale) and 1849.[1]

In this period, over one million acres of the eastern Iowa lands were sold in private transactions at an average price of $3.28 per acre.

TOTAL PRIVATE SALES FOR EASTERN IOWA CESSIONS[2]

Year	Acreage	Per Acre Average	Average Per Acre 15% Reduction	Average Per Acre 20% Reduction
1839	55,378	$3.37	$2.87	$2.70
1840	74,061	3.16	2.67	2.53
1841	76,978	2.98	2.53	2.38
1842	80,942	3.23	2.75	2.58
1843	73,405	3.18	2.70	2.54
1844	79,907	3.64	3.09	2.91
1845	92,166	3.48	2.96	2.78
1846	95,366	3.48	2.96	2.78
1839-1849 ..	1,040,081	3.28	2.79	2.62

[1] Reference to "public sales" is to the initial disposition made by the government in Iowa of tracts within the cession lands at the uniform governmentally dictated price of $1.25 per acre. "Private sales," however, were sales made between two private parties after such cession lands had been purchased at public sale.

[2] The source is petitioners' trial exhibits Q3.1 through Q3.19 and U3 (pp. 156-157) in petitioners' central Iowa case (see pp. 11, 14, *infra* and App. 91-120). The reduction of average resale prices by 15% and 20% is one of several accepted methods of eliminating improvement values.

The Commission held that the prices paid in these transactions would not have been known at the respective 1833, 1837 and 1838 valuation dates and therefore could not be assumed to be known to the hypothetical purchaser (which was the Commission's approach to valuation) of the eastern Iowa lands.

Instead, the Commission turned to the prevailing government sale price of $1.25 per acre for public lands as a starting point from which the Commission in general worked backwards in arriving at the following values for the eastern Iowa lands:

Year	Acreage	Value per Acre
1833	4,484,000	$ .90
1837	108,800	1.25
1838	990,833.5	1.10

That the rejection by the Commission of the private sales data as proof of the value of the eastern Iowa lands was immensely costly to the Sac and Fox is not a matter of conjecture. The very same private sale data was received in evidence and relied upon by the Commission in its valuation of lands ceded by the Sac and Fox Nation in central Iowa as of 1843. In its central Iowa decision, the Commission stated, "We feel that actual resale data in comparable areas at the same or comparable times are of such probative value that we can give little weight to an appraisal [provided by the government's witness] which ignores such data." (22 Ind. Cl. Comm. at 386; App. 92). The Commission found that the 8,592,000 acres owned by the Sac and Fox Nation in central Iowa were somewhat less desirable than the Sac and Fox eastern Iowa lands and had a value of $1.40 per acre in 1843. (22 Ind. Cl. Comm. at 390; App. 95)[1]

[1] Indeed, even opportunity for a brief glimpse of the actual private sales considerations paid for eastern Iowa land had a marked en-

Prior to the Commission's 1969 decision on the value of eastern Iowa, petitioners had no reason to foresee that the Commission would disregard and depart from an unbroken line of precedents of the Court of Claims[2] which required that post-cession private sales be accorded probative weight. Why the Commission did so is not known. No mention is made of these precedents in the Commission's 1969 decision or in its subsequent decision and orders in this case.

Following the Commission's 1969 valuation decision below, petitioners filed an extensive motion for rehearing with the Commission, again directing its attention to the precedents of the Court of Claims that the post-cession private sales data constituted probative proof (indeed the best evidence) of the value of the eastern Iowa lands and that it was error for the Commission to reject this evidence from its consideration. The motion was denied without comment or discussion by the Commission's order entered more than six months later, on February 11, 1970. (22 Ind. Cl. Comm. at 439; App. 89-90)

First Appeal to Court of Claims

Thereafter followed petitioners' first appeal to the Court of Claims which resulted in remandment to the Commission

lightening effect on the Commission's hypothetical purchaser. As co-petitioners in this cause were the successors to the Iowa Nation which the Commission found owned a joint and undivided one-half interest with the Sac and Fox Nation in the southern portion of eastern Iowa. The Iowa Nation ceded this interest in this tract to the United States under the Treaty of October 19, 1838 (7 Stat. 568) which had an effective valuation date of February 28, 1839. This early 1839 valuation date was shortly after the commencement of public sales of petitioners' lands in late 1838, and was therefore at the earliest point of development of the private sale market in the cession lands. The Commission awarded the Iowa petitioners $1.60 per acre for their eastern Iowa lands while noting:

> "The prospective purchaser [of the Iowa interest in 1839] would have examined the limited private resale data available to him and discovered that land was being sold within the [eastern Iowa] tract at an average price in excess of $2.30 per acre." (32 Ind. Cl. Comm. at 26, App. 11)

[2] See footnote 1 on page 9, *supra*.

"to supply more specific findings and reasoning" so that the Court of Claims could determine whether the eastern Iowa valuation decision was "adequately supported by substantial evidence" and untainted with legal error. (196 Ct. Cl. at 549; App. 20)

Proceedings on Remand to the Commission

Because of the Court of Claims' failure in its per curiam remanding decision to discuss its prior holdings respecting the probative value of post-cession sales evidence, and anticipating that the Commission might adhere to its 1969 decision rejecting such evidence in the record, petitioners attempted to expedite the final resolution of the valuation question by timely action:

> (a) Requesting the Commission to certify to the Court of Claims the narrow question as to the weight to be given to the post-cession private sales of eastern Iowa lands;
>
> (b) Twice asking leave of the Commission to allow petitioners to submit evidence of private sales of comparable unimproved lands in nearby states at and prior to the valuation dates; and
>
> (c) Requesting that the Commission judicially notice its own findings in other cases of pre-cession considerations received for unimproved and generally comparable lands.

But all of this was wholly without success. Each request was denied; no additional evidence was received or noticed by the Commission, and it persisted in rejecting petitioners' evidence of value provided by the post-cession eastern Iowa land sales.

In its 1973 opinion on remand, the Commission acknowledged that the difference between its decisions in the eastern Iowa and the central Iowa cases was that "in Docket 153 [concerning the Sac and Fox central Iowa lands] we used as primary evidence of value the identical [private]

land sales data [in eastern Iowa] which we refused to use in these dockets [in the eastern Iowa case]." (32 Ind. Cl. Comm. at 267; App. 12)

The difference expressed in dollars is substantial. In central Iowa, the use of the private sale data produces a value of $1.40 per acre, even though central Iowa was somewhat less desirable than the eastern Iowa lands. In eastern Iowa, where the evidence was rejected, the values found were substantially lower, including only 90¢ per acre for the predominant tract. In eastern Iowa, reference by the Commission to even the earliest of such private sales produced an award to the Iowa Nation of $1.60 per acre.[1]

In its 1973 opinion, the Commission three times said that it used the government public land price of $1.25 per acre as the starting point for its valuation of petitioners' eastern Iowa lands "because the record contained no evidence of comparable private land sales to the date of taking." (32 Ind. Cl. Comm. at 262; App. 8) Petitioners' efforts to offer this evidence or to have the Commission take judicial notice of it are not mentioned in the Commission's 1973 opinion.

Second Appeal to Court of Claims

Petitioners again appealed to the Court of Claims and raised, for a second time, the errors complained of on their prior appeal and the additional error of the Commission in refusing to permit petitioners to offer additional evidence consisting of private sales of comparable lands at and prior to the valuation dates for the eastern Iowa lands. By order entered on April 25, 1975, the Court of Claims summarily affirmed the 1969 and 1973 decisions of the Commission. (App. 1) On June 27, 1975, the Court of Claims denied petitioners' motion for rehearing *en banc*. (App. 2)

[1] See footnote 1 pp. 11-12, *supra*.

REASONS FOR GRANTING THE WRIT

I.

The Decisions Below Violate Due Process, The Intent Of The Remedial Indian Claims Commission Act, And The Rule In *Sinclair Refining Company* v. *Jenkins Petroleum Co.*, 289 U.S. 689 (1933) By Depriving Petitioners Of The Right To Fair Market Value For Their Eastern Iowa Lands By Adoption Of An Erroneous Hypothetical Valuation Standard Rather Than The Best Evidence Of The Real Value Of Petitioners' Lands.

The ample grounds that support issuance of a writ of certiorari under this Point I are: (1) that the tribunals below charged with administering justice under a highly remedial federal statute have applied the wrong legal standard of valuation that in fact defeats the intent of the Act; (2) that such fundamental error was committed in violation of and by ignoring the Court of Claims own apposite valuation precedents and the decision of this Court in *Sinclair Refining;* (3) that petitioners' grounds for reversal were summarily denied without opinion by the Court of Claims although that court well knew the importance of the questions which petitioners had pressed repeatedly in six years of appeals and this refusal to render an opinion by the Court of Claims so far departs from accepted conduct in the course of judicial proceedings as to call for exercise of this Court's supervisory authority over the federal judiciary; and (4) as appears from Points I and II, because the best evidence of value has been excluded by the Commission, petitioners have been denied both substantive and procedural due process of law in violation of the Fifth Amendment of the United States Constitution.

The Intent of Congress

The Indian Claims Commission Act was designed by Congress to provide a forum whereby all Indian claims

against the United States could be heard and determined once and for all on their merits. By consent to suit against the United States on legal, equitable and moral claims, Congress intended to put Indians on at least an equal footing with respect to the loss of their property as all other citizens. That these were the broad purposes of the Act was acclaimed by all concerned with its passage.

The Attorney General:

> "The jurisdiction to be conferred on the Commission would embrace not only claims of a legal or equitable nature by also those claims which are based solely on moral or ethical grounds and are not ordinarily justi-[c]iable in a court." (From statement enclosed with letter of Hon. Tom C. Clark, Attorney General, Hearings before Senate Committee on Indian Affairs on H.R. 4497, 79th Cong., 2nd sess., p. 25)

The Secretary of Interior:

> "The bill emancipates our Indian citizens from an outworn and discriminatory statute which, since 1863, has barred them from general access to the Court of Claims. For the future they will be permitted to sue on the same basis as their fellow citizens of other races to vindicate contract and property rights." (Letter of August 1, 1946 from Hon. J. A. Krug, Secretary of Interior to President Harry S. Truman)

Congress:

> "The bill in its present form is primarily designed to right a continuing wrong to our Indian citizens for which no possible justification can be asserted. Today any white man who has supplied goods or services to the United States under contract may, if the United States has failed to carry out its part of the bargain, go into the Court of Claims, or, in certain cases, into the Federal district courts, and secure a full, free, and fair hearing on his claims against the Government. This is an integral part of the American system of justice under which the humblest citizen and the highest official

> are equal before the law. The only American citizen today who is denied such recourse to the courts is the Indian." (House Report No. 1466, 79th Cong., 1st Sess., pp. 1-2)

The President:

> "This bill makes perfectly clear what many men and women, here and abroad, have failed to recognize, that in our transactions with the Indian tribes we have at least since the Northwest Ordinance of 1787 set for ourselves the standard of fair and honorable dealings, pledging respect for all Indian property rights. . . . [W]e stand ready to submit all such controversies to the judgment of impartial tribunals. We stand ready to correct any mistakes we have made. . . ." (Statement by President Harry S. Truman, released August 13, 1946 upon signing Act)

The General Legal Precedents

In the present Sac and Fox case, as in most Indian cases under the Act, petitioners' damages consist of the difference between the value of the lands owned by the Indian tribe at the time of taking by the United States and the consideration paid by the United States for the lands. The manner of valuing Indian lands is therefore crucial to the achievement of the objective that Congress contemplated by passage of the Act.

Certainly Congress did not wish to make a difficult task more difficult by imposing any limitation on the reach of the Commission's investigations or as to the evidence it might consider. Yet, in the present case, by refusing to look at evidence of value beyond the cession dates, the Commission has deprived itself of the unique opportunity of establishing the value of the Sac and Fox lands at the valuation dates in terms of the broad body of real evidence established by the actual prices which the cession lands brought in the private market place some 140 years ago. By also

refusing to permit petitioners to offer evidence of private sales of comparable lands at and prior to the valuation dates, the Commission effectively eliminated all of the best evidence from its consideration. Instead, the Commission valued eastern Iowa through the eyes of a single hypothetical purchaser. This creation of the Commission is denied any glimpse of the future; he cannot foresee what the eastern Iowa lands will soon actually sell for in the market place. Certainly this fictional purchaser, if he is to be used in the valuation process, should not also be denied all knowledge of selling prices for comparable lands at and prior to the eastern Iowa valuation dates. But he was.

The Commission's refusal to permit this evidence to be received is all the more puzzling because the Commission three times says that it used the government public land price of $1.25 per acre as its starting point for valuation "because the record contains no evidence of comparable private land sales at the date of taking." (32 Ind. Cl. Comm. at 262-264; App. 8-10) The use of this valuation starting point is in itself erroneous because the Commission in its findings acknowledges that the public sale price of $1.25 per acre has little to do with land values. The price, as the Commission found, "emerged as a compromise" between members of Congress who wanted the maximum price for government land and those who believed public lands should either be given away or sold for a nominal price. (20 Ind. Cl. Comm. at 472; App. 57)

Nor does the Commission's no-hindsight rule exist as an inflexible narrow proposition of law insofar as modern day valuation matters are concerned. The courts have not permitted parties' rights to be frustrated because there is a lack of evidence of current market value; they

look willingly in these circumstances to subsequent events occurring after the cause of action arose. In the present case, no market existed for the eastern Iowa lands until the government began to sell them to the public in late 1838, between one and five years after the respective valuation dates. Under these circumstances, the applicable valuation rule is set forth in *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U.S. 689 (1933). The Court held that, since no current market value for a patent existed at the time of breach of the patent agreement because of the uniqueness of the patent, uses of the patent subsequent to its breach constituted discoverable evidence to prove the value of the patent at the time of breach:

> "[T]he absence of market value does not mean that the offender shall go quit of liability altogether. The law will make the best appraisal that it can, summoning to its service whatever aids it can command. . . . At times the only evidence available may be that supplied by testimony of experts as to the state of the art, the character of the improvement, and the probable increase of efficiency or saving of expense. . . . This will generally be the case if the trial follows quickly after the issue of the patent. But a different situation is presented if years have gone by before the evidence is offered. *Experience is then available to correct uncertain prophecy. Here is a book of wisdom that courts may not neglect. We find no rule of law that sets a clasp upon its pages, and forbids us to look within. . . .*
>
> "To correct uncertain prophecies in such circumstances is not to charge the offender with elements of value nonexistent at the time of his offense. It is to bring out and expose to light the elements of value that were there from the beginning. . . .
>
> "An imaginary bid by an imaginary buyer, acting upon the information available at the moment of the breach, is not the limit of recovery where the subject of the bargain is an undeveloped patent. Information

> at such a time might be so scanty and imperfect that the offer would be nominal. The promisee of the patent has less than fair compensation if the criterion of value is the price that he would have received if he had disposed of it at once, irrespective of the value that would have been uncovered if he had kept it as his own. . . . The market test failing, there must be reference to the values inherent in the thing itself, whether for use or for exchange. . . . These will not be known by first imagining a forced sale, and then accepting as a measure its probable results. The law is not so tender to sellers in default." *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.,* 289 U.S. at 697-9. (Citations omitted.) (Emphasis added.)

In a later case applying the *Sinclair Refining* doctrine for patent infringement, the federal district court for Maryland noted that it is proper to determine damages as of the time the patent issued by considering later royalties paid to the infringer, thus gaining the *"advantage of hindsight,* as permitted by Sinclair Refining Co. v. Jenkins Petroleum Process Co." *Carter Products, Inc.* v. *Colgate-Palmolive Company,* 214 F.Supp. 383, 393 n. 9 (D.Md. 1963) (Emphasis added.)

Similar post-valuation date evidence has been held admissible in eminent domain cases to establish the value of property taken at the time of condemnation. *United States* v. *Brooklyn Union Gas Co.,* 168 F.2d 391, 397 (2d Cir. 1948) (considering events occurring after condemnation of public utility franchise, the Court of Appeals noting, "It would seem an eerie conclusion that a court must resort to guess, closing its eyes to reality, when its decision must actually be formulated after the true facts have become available."); *United States* v. *237,500 Acres of Land, etc.,* 236 F.Supp. 44 (S.D. Cal. 1964), aff'd *sub nom.* 404 F.2d 336 (9th Cir. 1968) (holding that in light of the lack of market value at the date of condemnation of leasehold interest in

lands containing the mineral pumice, it was proper to consider evidence of increasing competition in the pumice market over a number of years following the date of taking); *Arkansas Louisiana Gas Co.* v. *McGaughey Bros., Inc.,* 468 S.W.2d 754 (Ark. 1971) (permitting jury consideration of state of facts available at time of trial regarding a completed gas line which was condemned prior to completion).

Although petitioners repeatedly cited *Sinclair Refining* and its progeny to both the Commission and the Court of Claims, the decisions below fail to distinguish or even cite this Court's teaching in that case.

Precedents in Indian Cases

The precedents of the Court of Claims in Indian cases involving claims under the Act and special jurisdictional acts have consistently held post-cession private sales transactions in ceded lands to be competent proof of the value of those lands. The order of the Court of Claims on the second appeal provides no enlightenment as to the status or future legal significance of these precedents. The four decisions below of the Commission and the Court of Claims do not mention these cases.

But for the Commission's decisions in the case at bar, the importance of the valuation data provided by private sales within a reasonable time after cession of Indian lands would seem too well established to require any extended argument. The first decision of the Court of Claims to consider post-cession private sales within ceded Indian territory was *Alcea Band of Tillamooks, et al.* v. *United States,* 115 Ct. Cl. 463, 504, 87 F.Supp. 938, 947 (1950), reversed as to interest, 341 U.S. 48 (1951), where evidence was presented of private sales which occurred over 20 years after the 1855 valuation date.

In *Rogue River Tribe of Indians, et al.* v. *United States,* 116 Ct. Cl. 454, 478, 89 F.Supp. 798, 803 (1950), cert. denied, 341 U.S. 902 (1951), the Court of Claims followed the *Alcea* case by considering "various elements of value . . . [including evidence of] actual disposals of the tribal lands after the taking by the Government . . ." (*Rogue River Tribe of Indians, et al.* v. *United States,* 116 Ct. Cl. at 484, 89 F.Supp. at 807) In *Osage Nation of Indians* v. *United States,* 119 Ct. Cl. 592, 97 F.Supp. 381 (1951), cert. denied, 342 U.S. 896 (1951), evidence was received of private resales within the 8-year post-cession period. The Court of Claims held that this evidence could properly be relied upon to show that the $1.25 public land sale price was a poor indication of the fair market value of the Osage lands.

The decisions in *Osage, Rogue River,* and *Alcea* were reaffirmed by the Court of Claims in *Miami Tribe of Oklahoma et. al.* v. *United States,* 146 Ct. Cl. 421, 450-451, 175 F.Supp. 926, 943 (1959):

> *"If, as in The Osage case, there is evidence of private sales not controlled by the Government's minimum statutory price for public lands, these sales should be taken into consideration in determining value. . . ."* (Emphasis added.)

In 1964, after the trial of the present case on value, and prior to the Commission's 1969 decision on value, the Court of Claims held on appeal from another decision of the Commission by certain of the Sac and Fox petitioners here—

> "We conclude that the Commission erred in disregarding substantial evidence offered by appellants as to private contemporaneous and comparable sales of lands within and adjacent to the subject tract." *Sac and Fox Tribe of Indians of Oklahoma* v. *United States,* 167 Ct. Cl. 710, 719, 340 F.2d 368, 373 (1964).

The evidence submitted by the Sac and Fox included private sales occurring between 1892 and 1900, which was the

nine-year period following the cession of the Oklahoma lands involved in that proceeding.

II.

Petitioners Have Been Deprived Of Fair Market Value For Their Eastern Iowa Lands By Being Denied The Right To Submit Additional Evidence Of Value In Conformity With A New Rule Of Law Which Was Retroactively Applied To Petitioners' Case After Trial In Violation Of The Rule In *Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1971)

The important considerations of preventing violation of the Court's *Huson* decision and of avoiding frustration of the basic purposes of the Act are strong reasons for grant of certiorari in this case. Petitioners have suffered the retroactive application of a change in the law without being allowed to present evidence of pre-cession sales which would comply with the new standard. Thus, petitioners have been denied a hearing respecting the fair value of their lands as proven by market sales.

Petitioners believe that the record made at the trial of this case in 1962 abundantly established the best evidence of the actual value of the Sac and Fox lands through private post-cession sales of over one million acres shortly after cession. Based upon the governing decisions of the Court and the Court of Claims referred to in Point I, petitioners believed at the time of trial and they continue to believe today that the Commission erred in failing to give substantial probative weight to this best evidence of value. The Commission, however, stated in its 1973 opinion the contrary view that it chose as its valuation base the $1.25 public land sale

> ". . . price because the record contained no evidence of comparable private land sales prior to the date of taking." (32 Ind. Cl. Comm. at 262; App. 8)

This statement, repeated by the Commission three times (32 Ind. Cl. Comm. at 261-3; App. 8-10) in its opinion, is legally erroneous and factually misleading.

The only reason that the Sac and Fox petitioners did not satisfy the Commission's erroneous preference for pre-cession private sales is because the Commission's own orders twice denied petitioners the right to present such evidence following the Court of Claims remand in 1971. At the time those orders were entered, petitioners were preparing pre-cession sale data for submission through the work of abstractors who had already been engaged by petitioners and who were actively compiling such pre-cession land sale data for adjoining and generally comparable (though less valuable) Missouri lands. Petitioners represented to the Commission that they expected to prove by this evidence average pre-cession private sale considerations of over $2 per acre.

Evidence of private sales of comparable lands in other states prior to the cession dates was not offered by petitioners at the time of trial in 1962 because there was then no Supreme Court or Court of Claims precedent which would foreshadow the holding of the Commission in the present case that post-valuation private sales of the lands being valued would not be considered as proof of the value of those lands. If the Commission may change the law and hold that post-cession private sale data should not be used in the valuation process, this represents a change in applicable legal precedent which, in petitioners' view, originated with the Commission's 1969 opinion in this case.[1] In no event should such a change be applied retro-

[1] The Commission is bound by the precedents of the Court and the Court of Claims, and in petitioners' view, the Commission does not have the power to change or depart from the legal principles established by those decisions. But if it is assumed that the Commission may establish its own valuation methods without regard to the prior precedents of those higher federal courts, a new legal principle should not, without warning and without relief, be applied retroactively to the detriment of the Sac and Fox petitioners in this case.

actively so as to preclude appellants from an evidentiary hearing in terms of the new rule of law.

In *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971), the Court stated criteria which should be considered as to whether a change in legal precedent should be retroactively applied:

> "In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, e.g., Hanover Shoe v. United Shoe Machinery Corp., supra [392 U.S. 481 (1968)], at 496, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., Allen v. State Board of Elections, supra [393 U.S. 544 (1969)], at 572. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' Linkletter v. Walker, supra, at 629. Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.' Cipriano v. City of Houma, supra [395 U.S. 701 (1969)], at 706."

In view of the broad remedial purposes of the Indian Claims Commission Act and in terms of the retroactivity criteria established by the Court, the Commission should have permitted the Sac and Fox petitioners to offer evidence of private land sales in other states which took place prior to the cession dates. The Commission repeatedly refused to allow the presentation of such evidence and this was error denying petitioners due process of law.

CONCLUSION

The Sac and Fox petitioners have never been afforded a hearing on the best evidence of value of their eastern Iowa lands, whether that best evidence is the post-cession sale transactions in those lands as petitioners contend, or private sales transactions in comparable lands at or prior to the cession dates as claimed for the first time in the Commission's 1969 opinion. The Commission rejected the former evidence and refused to permit petitioners to offer the latter evidence. By this failure to grant a hearing with respect to the best evidence of value of the cession lands, petitioners are deprived of due process and the principal purpose of the Indian Claims Commission Act is violated because the claim of the Sac and Fox Nation for the wrongful taking of these incomparable lands will not have been fairly resolved and that claim will still remain.

Accordingly, petitioners respectfully pray that the Court grant a writ of certiorari herein so that this case may be remanded to the Court of Claims for a determination of the fair market value of the cession lands in accordance with the Court of Claims' own governing precedents and this Court's rule in *Sinclair Refining*. Alternatively and secondarily, petitioners respectfully pray that the Court grant this petition for a writ of certiorari to summarily vacate the decisions below and to remand this case to the Commission with instructions to reopen the record to permit petitioners to submit evidence of pre-cession sales in tracts comparable to petitioners' eastern Iowa lands.

Respectfully submitted,

GEORGE B. PLETSCH,
Attorney of Record for The Sac and Fox Tribe of Indians of Oklahoma, Edward Mack, Pauline Lewis and William Newashe
7200 Sears Tower
Chicago, Illinois 60606

AARON J. KRAMER,
SCHIFF HARDIN & WAITE
Of Counsel

LAWRENCE C. MILLS,
Attorney of Record for The Sac and Fox Tribe of the Mississippi in Iowa, Kenneth Youngbear, Charles Davenport, Harry Lincoln, Albert Davenport, Edward Davenport, Percy Bear and Columbus Keahna
29 South La Salle Street
Chicago, Illinois 60603

MILLS AND GARRETT,
Of Counsel

STANFORD CLINTON,
Attorney of Record for The Sac and Fox Tribe of Missouri, Charles W. Robidoux, John Connell, Dorothy Gilfillian, Thomas Green and Thomas Herrick
6000 North Bay Road
Miami Beach, Florida 33140